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SUPREME COURT, U.S.

No. 1048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

GEORGE J. COTTAGE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OPINION BELOW

The opinion of the Court of Appeals Sixth Circuit, is reported at ... F2 .... A copy of the opinion is printed as an appendix to this Petition, (pages 9-10, *infra*).

JURISDICTION

The opinion of the Court of Appeals was filed on December 30, 1965. Within the statutory period of twenty days, a petition for rehearing was filed on January 10, 1966, and a denial of said petition for rehearing was made on January 25, 1966. The jurisdiction of the Court is invoked under the rules of the Supreme Court.

QUESTIONS PRESENTED

Did the Court err in submitting the case to the jury on all three counts of the indictment, namely Theft in Interstate Commerce, (2) receiving goods stolen in Interstate Commerce, and (3) Conspiracy to steal goods in Interstate Commerce?

The District Court answered "No".

The Court of Appeals said that it didn't matter because Petitioner was convicted on all three counts and given the same sentence on all three counts, and held that the conviction on Count 3 was good and due to the same sentences, it did not have to pass on Counts 1 and 2.

CONSTITUTIONAL PROVISION INVOLVED

The due process clause of the sixth and fourteenth Amendments of the United States of America.

STATEMENT OF THE CASE

On February 13, 1962, an indictment, consisting of three counts was returned by the Grand Jury at Detroit, Michigan, charging the petitioner (1) with the theft of a truckload of whiskey moving in interstate commerce; (2) the second count charged the petitioner with receiving a truckload of whiskey, and the third count charged petitioner and others with conspiracy to steal a truckload of whiskey in Interstate Commerce.

It was shown at the trial that the same whiskey was involved in all three counts.

The petitioner, George J. Cottage was found guilty on all three counts charged and reference is made to all three counts in the Judgment and Commitment. Motion for a new trial was made and denied in the District Court. Appeal was made and denied in the Court of Appeals and a petition for a rehearing was also denied.

REASONS FOR GRANTING WRIT

The decision of the Court of Appeals should be reviewed because it erroneously interprets the right of the petitioner under the Constitution in that he was entitled to a fair and impartial trial and verdict.

The Appellate Court stated that it did not have to and did not pass on the validity of petitioner's conviction on counts 1 (theft) and 2 (receiving) but that it was sufficient to only pass on count 3 (conspiracy to steal) because the sentences on all counts were the same length and concurrent and affirmed the conviction on the third count.

The Appellate Court said in its opinion, quoting from page 2 of the opinion:

> "The rule is that a judgment and commitment may properly be affirmed if supported by a valid conviction upon one count notwithstanding the fact that a like sentence was improperly imposed upon another count if the sentences are of equal length and are to be served concurrently. . *Manisia v. United States,* 296 P. 2d 871 (CCA 8); *Green v. United States,* 358 U.S. 326; *United States v. Sheridan,* 329 U.S. 379; *Hirabayashi v. United States,* 320, U.S. 81."

The Court of Appeals took cognizance of the legal question and main contention of petitioner and after making the following statement on page 2, quote:

> "The main contention of Defendant Cottage is that, as a matter of law, he could not be found guilty of both stealing the whiskey and receiving the whiskey and that therefore the sentences on counts 1 and 2 against him should be reversed. It is also contended on behalf of both defendants that because there was joint action on their part in stealing the whiskey, as charged in Count 1, they could not be convicted of conspiracy under Count 3.
>
> "We find no merit in this contention with regard to the validity of the conviction under Count 3. The conviction being valid, we are of the opinion that it makes no difference whether the convictions under Counts 1 and 2 are good or bad, since the sentences imposed on Defendant Cottage were made concurrent and were of equal length."

It was the contention of the petitioner that the Court should have granted him a new trial, based on Justice Stewart's opinion in *Milanovitch v. U. S.,* 365 U.S. 551, 5 L. Ed. 2nd 773, in which Justice Stewart said it was not enough to set aside the sentence on one of the counts.

The Court said:

> "It is now contended that setting aside the sentence on the receiving count was not enough—that the conviction on the larceny count must also be reversed, and the case remanded for a new trial. The argument is that although the evidence was sufficient to support a conviction for either larceny or receiving, the judge should have instructed the jury that a guilty verdict could be returned upon either count but not both. It is urged that since it is now impossible to say what verdict would have been returned by a jury so instructed, and thus impossible to know what sentence would have been imposed, a new trial is in order. This was the view of Chief Judge Sobeloff, dissenting in the Court of Appeals. 275 F. 2d at 721."

Judge Sobeloff in the Fourth Circuit decision, *supra*, (which was referred to in the Supreme Court decision with approval), said:

> "To summarize: Just as it is not for judges but for the jury, where a jury trial has been prayed, to find a verdict of guilty, however plain the case may appear to be, so judges may not assume to choose between alternatives available to the jury. Judges may not do so even for the laudable purpose of preventing the possibility of error on the jury's part.
>
> Likewise, if guilt is pronounced on two counts where, under proper instructions, conviction could be permitted on only one, neither the district judge nor the appellate judges may take it upon themselves to speculate which count the twelve jurors would have unanimously picked if they had been correctly instructed. Virginia Milanovich was entitled to have the choice made under proper instructions by the jury before whom she elected to be tried; without this, she may not be deprived of her liberty.

> "Since we cannot be certain what the jury would have decided if not erroneously charged, the doubt must be resolved in her favor. Either she should be given the benefit of the lesser sentence, or a new trial should be awarded."

Also see *Gebardi v. U. S.*, 287 U.S. 112.

In the *Gebardi Case, supra,* the Court said:

> "Where it is impossible under any circumstances to commit a substantive offense without co-operative action, the preliminary agreement to commit the offense is not an indictable conspiracy either at common law or under the Federal Statute punishing conspiracy to violate a law of the United States."

See also *In re Vickers,* 371 Mich. 114, in which the Court said:

> "Abortion involves consent of action between two persons, the perpetrator and the victim, the immediate effect of consummation reaching only the participants, as also in respect to adultery, bigamy, incest, or dueling, in which a charge of conspiracy to commit the offense will not lie against the 2 participants. This is because the conspiracy to commit them is in such close connection with the objective offense as to be inseparable from them."

In *Balman v. U. S.,* 94 F. 2nd 197, in deciding a case where an objection was made to a trial Court's charge on "burden of proof," the Appeal Court said:

> "We feel it to be important that no precedent should be indulged which may probably lead to laxity of statement so important in criminal proceedings."

Appellant feels that the attitude of the Court in the *Balman case, supra,* in preventing the creation of a questionable precedent, could be adopted in this case in view of the settled principles of law that were overlooked, and not considered here.

It is emphasized that the appellant petitioner should not suffer because of the omissions of either the Trial Court, defense counsel or Government counsel.

RELIEF SOUGHT

Certiorari should be granted.

Respectfully submitted,

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Detroit, Michigan 48226.

IN THE

United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GEORGE J. COTTAGE and KEITH DARWIN FRANCISCO, *Defendants-Appellants.*	On APPEAL from the District Court of the United States for the Eastern District of Michigan Southern Division.

Decided December 30, 1965.

OPINION

Before: MILLER* and PHILLIPS, Circuit Judges, and McALLISTER, Senior Circuit Judge.

PER CURIAM. The defendants-appellants, Cottage and Francisco, were charged in Count 1 of the indictment with stealing a truckload of whiskey moving in interstate commerce. The same two defendants were also charged in the third count of the indictment with the offense of conspiring with others to steal a truckload of whiskey moving in interstate commerce. The defendant Cottage, but not the defendant Francisco, was also charged in the second count of the indictment with receiving a truckload of whiskey

* The late Judge Shackleford Miller presided at the hearing of this case, but did not participate in this opinion.

stolen while moving in interstate commerce. The jury found the defendant Cottage guilty on the first and third counts of the indictment. Defendant Cottage received a sentence of three years on each of the three counts, to run concurrently. Defendant Francisco received a sentence of five years on each count, to run concurrently.

The main contention of the defendant Cottage is that, as a matter of law, he could not be found guilty of both stealing the whiskey and receiving the whiskey, and that therefore the sentences on Counts 1 and 2 against him should be reversed. It is also contended on behalf of both defendants that, because there was joint action on their part in stealing the whiskey, as charged in Count 1, they could not also be convicted of conspiracy under Count 3.

We find no merit in this contention with regard to the validity of the conviction under Count 3. That conviction being valid, we are of the opinion that it makes no difference whether the convictions under Counts 1 and 2 are good or bad, since the sentences imposed on defendant Cottage were made concurrent and were of equal length; and the sentences imposed on Francisco were also made concurrent and were of equal length. The rule is that a judgment of commitment may properly be affirmed if supported by a valid conviction upon one count, notwithstanding the fact that a like sentence was improperly imposed upon another count, if the sentences are of equal length and to be served concurrently. *Masinia v. United States,* 296 F.2d 871 (C.A. 8); *Greene v. United States,* 358 U.S. 326; *United States v. Sheridan,* 329 U.S. 379; *Hirabayashi v. United States,* 320 U.S. 81.

In accordance with the foregoing the judgments are affirmed.

ORDER DENYING PETITION FOR REHEARING

(Filed January 25, 1966)

Before: MILLER* and PHILLIPS, Circuit Judges, and McALLISTER, Senior Circuit Judge.

The above cause coming on to be heard on appellant's petition for rehearing, and the Court being duly advised:

Now, therefore, it is Ordered, Adjudged and Decreed that the petition for rehearing be and is hereby denied.

Entered by Order of the Court,

/s/ Carl W. Reuss,
Clerk.

*The late Judge Shackelford Miller presided at the hearing of this case, but did not participate in this order.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1048

GEORGE J. COTTAGE, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on all counts of a three-count indictment charging him with larceny, receiving stolen property and conspiracy to commit larceny, in violation of 18 U.S.C. 659 and 371. Each count related to the theft of a Roadway Express Company tractor-trailer containing 880 cases of whiskey on November 30, 1961 (see R. 9a-14a, 39a-66a).[1] Petitioner was

[1] The record of trial, filed with the clerk of this Court, includes one volume containing excerpts from the transcript

sentenced to imprisonment for concurrent three-year terms on each count, and the court of appeals affirmed *per curiam* (Pet. 9-10; 354 F. 2d 975).

Relying on *Milanovich* v. *United States*, 365 U.S. 551, petitioner contends that he could not be lawfully convicted of both larceny and receiving stolen property with regard to the same transaction and that therefore his commitment under counts one and two was improper. As the court below pointed out, however, this case, unlike *Milanovich*, includes a valid conviction on an additional charge.[2] Petitioner does not contend that the evidence was insufficient to support his conviction of conspiracy to commit larceny.[3]

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of trial and a separate volume containing the charge to the jury.

[2] This case also differs from *Milanovich* in that here identical sentences were imposed for both the larceny and the receiving-stolen-property convictions.

[3] The evidence showed that, about two hours before the theft, petitioner told co-conspirator Harowski that he might unload cargo from a Roadway Express Company truck later that night into a garage leased by Harowski (R. 68a-69a, 80a). The garage owner testified that, some time prior to the theft, petitioner had displayed an interest in buying the garage and had inspected the inside (R. 91a-95a). Shortly after the theft, officers observed the stolen trailer being unloaded at Harowski's garage (R. 38a-40a, 75a, 123a) where, later that night, the stolen whiskey was found. After the trailer had been unloaded, the officers observed co-defendant Francisco attempting to attach a tractor to it (R. 16a, 27a, 38a). When questioned as to the trailer's cargo, Francisco acted suspiciously (R. 17a-18a, 29a-30a). A clerk at the hotel where Francisco had registered the day before the theft, supposedly for a one-week tenancy, testified that petitioner met Francisco at the hotel and that, on the afternoon of the theft, petitioner told her that he and Francisco were going to a

Instead, he apparently relies (see Pet. 6) on the rule that, "when by definition the intended substantive offense requires a plurality of actors, a conspiracy prosecution cannot be maintained if only the minimum number of parties logically necessary for the commission of the substantive offense agree to commit it." See *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 954 (1959). But that doctrine is inapplicable here, since larceny is plainly not an offense which, by definition, requires a plurality of actors.

Because petitioner's conviction on count three of the indictment is clearly valid, and since he received equal concurrent sentences on all three counts, there is no occasion to review the convictions on counts one and two. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Sinclair* v. *United States*, 279 U.S. 263, 299; *United States* v. *Sheridan*, 329 U.S. 379, 381; *United States* v. *Berger*, 338 F.2d 485 (C.A. 2), certiorari denied, 380 U.S. 923; *United States* v. *Bentvena*, 319 F.2d 916, 954 (C.A. 2), certiorari denied, 375 U.S. 940; *United States* v. *Conte*, 349 F.2d 304 (C.A. 6), certiorari denied, 382 U.S. 926; *United States* v. *Tenenbaum*, 327 F.2d 210 (C.A. 7), certiorari denied, 377 U.S. 905; *Carter* v. *United States*, 332 F.2d 728 (C.A. 8), certiorari denied, 379 U.S. 841; *Arellanes* v. *United States*, 302 F.2d 603 (C.A. 9), certiorari denied, 371 U.S. 930; *Fabianich* v. *United*

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trucking company and would be gone for a while (R. 102a-107a). The clerk further stated that Francisco's bed was not slept in on the evening of the theft and that, after he left the hotel that afternoon, he did not return or pay his bill (*ibid.*).

States, 302 F.2d 904 (C.A.D.C.), certiorari denied, 371 U.S. 816.

It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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MARCH 1966.

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